No. 21

Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS MARTINO,
PETITIONER

v.

MICHIGAN WINDOW CLEANING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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OPINIONS BELOW

Pertinent statements of the lower Court's opinions will be cited in the argument and Brief to follow.

JURISDICTION

Petitioner's statement of jurisdiction fails to mention the fact that Certiorari was originally denied by this Court on February 26, 1945. Thereafter Certiorari was granted *sua sponte* by this Court on June 18, 1945.

QUESTIONS PRESENTED

The questions now presented by Petitioner in his present brief are at variance not only with the questions presented in the petition for the Writ of Certiorari but the questions submitted by him to the Circuit Court of Appeals.

In the Petitioner's Brief (page 2), the second question has been changed materially. The original question presented by the Petitioner in his application for a Writ of Certiorari was:

> "Whether employees who spend the greater part of their time washing windows in buildings in which goods are produced for interstate commerce are 'engaged in the production of goods for commerce' within the meaning of the Fair Labor Standards Act."

The question now presented by the Petitioner is based upon a single clause separated from the full meaning and content of the definition contained in the Fair Labor Standards Act. The Act reads:

> "Sec. 3. As used in this Act * * *
>
> (j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employe shall be deemed to have been engaged in the production of goods if such employe was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

The third question presented by the Petitioner was never raised in the Circuit Court of Appeals.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

It is the contention of the Respondent that the questions involved, based upon the content of the opinions of Judge Picard (R. 14-16 and R. 17-21) are:

> "1. Is a concern, exclusively engaged in washing windows of buildings, which it does not own or control, all of which buildings are located within the State of Michigan, a 'service establishment' within the meaning of Sec. 13 (a) of the Fair Labor Standards Act of 1938?
>
> 2. Since the concern is a 'service establishment' within the meaning of the law, does the exemption operate if the concern is engaged exclusively in servicing buildings located only in the State of Michigan?"

In addition to the foregoing questions which were decided upon by the District Court and the Circuit Court of Appeals, the Respondent submitted the following question which, while not decided by the Circuit Court of Appeals, is pertinent to the case at bar to indicate the background of the relations between the employer (Respondent) and the employee (Petitioner).

> "3. May employees maintain a suit for additional overtime pay, damages and attorneys' fees under the Act, where a bona fide agreement was entered into as a result of collective bargaining, between them through their legal representative union and the employer, said agreement covering hours of labor, rates of pay and overtime pay, closed shop provisions, based upon a mutual understanding and belief that the Fair Labor Standards Act did not apply to the employees, which said agreement had been fully consummated and adhered to by the parties?"

STATUTE INVOLVED

While Petitioner in his Brief submitted what he terms pertinent provisions of the Fair Labor Standards Act, it is Respondent's position that the entire Act must be taken into consideration, particularly the Congressional findings and declaration of policy, as stated in the Statute as follows:

> "The Congress hereby finds that the existence, in *industries engaged in commerce or in the production of goods for commerce*, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) *leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;* and (5) interferes with the orderly and fair marketing of goods in commerce." (Italics ours.)

Sections 205 and 208 are important in order to gain a proper perspective of the workings of the Act and which clearly show the purposes intended by Congress in the passage of the Act.

Section 213 provides the exemptions which Respondent contends covers its employees.

COUNTER-STATEMENT OF FACTS

A.

A reading of the Petitioner's statement would lead one to such an erroneous conclusion of facts that Respondent is compelled to submit a Counter-statement of Facts which are essential to a proper understanding of the controversy.

The Respondent is engaged in washing and cleaning of windows on buildings located wholly within the State of Michigan. It contracts to perform the services of washing and cleaning windows on any and all buildings in the State of Michigan and employs workmen to do the work of washing and cleaning of windows. It neither owns nor leases the buildings upon which the work is performed, and has nothing whatever to do with, and no control over, the activity going on in the building and is not at all concerned with the activity of the persons for whom it washes and cleans windows (17-19).

The Petitioner, employee of the Respondent, is a member of Local 139, Detroit Window Cleaners Union, American Federation of Labor, and was such member for a number of years previous to 1939 and up to and including the date of the litigation now pending. The Union, acting for and in behalf of the Plaintiffs and Appellants, had made an agreement with the Defendant and had renewed it for a number of years preceding and including 1939, up to and including the time of commencement of the present suit (R. 10).

The payment of compensation by Defendant to its employees, including the Plaintiffs in this suit, was in accordance with the agreement between the Plaintiffs and the Union on one hand, and the Defendant on the other. The agreement referred to and those agreements that preceded it, were freely, voluntarily and in good faith entered into between the Union acting on behalf of its members and auth-

orized so do do, and the defendant employer. All the agreements executed between the Union on behalf of its members and the Defendant from the time their relations first began were fully observed by the Defendant. The agreement between the parties in existence at the time suit was started, and its predecessors, provided for a closed shop. (R. 10.)

B.

Stipulations of Fact were entered into by counsel for the respective parties in the District Court. (R. 9-12.) Following this, Petitioner (Plaintiff) filed his Motion for Summary Judgment. (R. 12-13.) The District Court never directed Petitioner to renew a Motion for Summary Judgment. The District Court, in his first opinion filed February 3, 1943, said the following in his concluding paragraph (R. 16):

> "The motion for summary judgment is therefore denied and proofs will be taken unless the facts can be further stipulated."

Subsequently, three months after the first opinion by the District Court, additional facts were stipulated. (R. 16-17.) On June 15, 1943, Petitioner renewed his Motion for Summary Judgment and in the motion of Petitioner is found the statement (R. 17.):

> "This motion is submitted on briefs, in accordance with the instructions of the Court."

In other words, Petitioner is now attempting to transmute his own statement into a directive from the District Court. The directive was for no further argument and not for the filing of the motion. This is clearly set forth in the motion by the Petitioner in the District Court in which nowhere does it appear that the motion itself was directed by the Court.

After the Petitioner renewed his motion for Summary Judgment and counsel for the respective parties had filed

their briefs, the District Judge on July 14, 1943, filed his opinion denying Petitioner's motion and ordered a judgment to be entered in favor of the Respondent (Defendant) in accordance with his opinion (R. 17-21).

Petitioner's statement of the finding of the District Court is at variance with the language employed by the trial court. The trial court found:

> "Sixth: The Court finds, however, that the defendant herein is a service establishment, the greater portion of whose servicing is in intrastate commerce, and that the defendant comes within the exemption covered by Section 13 (a) (2) of the Fair Labor Standards Act." (R.22.)

C.

Petitioner's summary of argument consists of a series of statements of conclusions based upon erroneous and misleading facts. Petitioner makes a statement and therefore assumes that by the making of the statement it must necessarily be true. The summary includes facts which were never submitted or passed upon by either the District Court or the Circuit Court of Appeals. The conclusions of fact now relied upon by the Petitioner are based upon a shifting of position by the Petitioner from the broad aspects of the definition used in the Act (Section 3, j) and an attempted limiting of the discussion and argument to an isolated clause in one paragraph of the definition.

D.

Again we call this Court's attention to the fact that the question as to whether the complaint of the Petitioner in the lower court was dismissed on the court's own motion was never presented to the Circuit Court of Appeals, and was raised for the first time in the petition for Writ of Certiorari to this Court.

ARGUMENT

I.

The brief of Appellant indulges in legal sophistries, and conclusions based thereon, which if sustained, would reduce the obvious intent of the law to an absurdity. Petitioner in this way seeks to read into the law, Section 13 (a) (2) of the Fair Labor Standards Act, a provision never intended, namely, that the criterion for coverage is not what business the employer is engaged in but the business that the customer of the employer is engaged in and the type of work employees of the customer are engaged in. Nowhere in the law is there any excuse or basis for such assumption.

Petitioner quotes extensively from interpretative bulletin No. 6 of the Fair Labor Standards Act. In view of the fact that the case at bar devolves upon the exemptions contained in Section 213 of the Act, it is necessary that we examine this interpretative bulletin No. 6 to see what it has to say on the applicability of exemptions. In the Wage and Hour Reference Manual, volume 1, page 56, we find the following quotation from interpretative bulletin No. 6:

> "It should be noted that the test prescribed in sections 6 and 7 is related to the nature of employment of the particular *employee. The criterion used in Section* 13 (a) (2), *on the other hand, is based upon the nature of the business conducted by the employer.* Thus, under sections 6 or 7 *some* employees of a given employer may be covered and others may not be covered. If, however, the exemption provided by Section 13 (a) (2) is applicable because the greater part of the selling or *servicing* by the retail or *service establishment* is in intra-state commerce *all* employees of the establishment are exempted from Section 6 and 7."—(Italics ours.) (The exemption of Section 13 (a) (2) applies to service companies, as in the case at bar.)

With the foregoing citation in mind, it is plain to see that Petitioner is proceeding upon an erroneous theory which is not supported by the law or the interpretative bulletin. Petitioner contends the opposite of the clear intent of the law and the interpretative bulletin, *supra*. In effect, Petitioner goes so far as to seek to maintain that the criterion for coverage is based upon the nature of the work done by employees of the customer of the Respondent.

To carry Petitioner's argument to its logical conclusion would necessitate that every service establishment,—cleaners, barbers, laundries, window-cleaners, make inquiry of their respective customers as to the nature of the work that they or their employees are engaged in, in order to ascertain whether employees of the service establishment are to be covered by the Act.

The District Judge in his opinion filed February 3, 1943 (R. 14-15), said:

> "It is well to note, however, that in the Court of Appeals decisions of this same case, 124 Fed. (2nd) 572-3, the court in suggesting illustrations of what Congress meant by 'service establishments' specifically mentioned
>
> 'barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops.'
>
> Evidently, therefore, that court with a broad and liberal interpretation of the Fair Labor Act in mind and desirous of accomplishing the objective of Congress on as broad a basis as possible, included 'laundries' among those exemptions. Of course the court evidently meant 'clothes laundries,' but is there a great deal of difference between the ultimate functions of a laundry for clothes and a laundry for windows? What the Court of Appeals said, however, in quoting the foregoing illustrations from another decision is only dictum, but we believe there is a distinction between the facts in the Kirschbaum

case and the facts here. In the Kirschbaum case the employees were all part of and went with the rental of the building. Kirschbaum wasn't furnishing 'service' as such. But here the defendant was furnishing window washing and this in our opinion makes it obviously a service.

Evidently Congress anticipated the possibility of purely service establishments rendering service to those engaged in interstate commerce and those not so engaged. Otherwise why did it so word the exemption as to exclude those service establishments where the greater part of their service was done in intrastate commerce?'' (Italics ours.)

Following the decision in the case of *Lonas v. National Linen Service Co.*, 136 Fed. (2nd) 433, the District Court Judge filed an opinion on July 14, 1943 (R. 17-21), and said:

''The question here then is:

'Is a service establishment engaged in interstate commerce because its employees (who do not go out of the state to work) do render service to customers who are admittedly engaged in interstate commerce, which service indirectly aids those customers ''in the production of'' their ''goods for interstate commerce'' and which service amounts to more than 50 per cent of the service establishment's business?'

If the position contended for by the plaintiff is a correct statement of the law, then a comparatively few people, service establishments or otherwise, would not be included as subject to the Fair Labor Standards Act. If rendering the service of washing windows in a building for occupants who are engaged in interstate commerce automatically makes the window washers engaged in interstate commerce it would be difficult under our complex economical and commercial life to conceive a situation where any workman would not come under the Act. From this conclusion it would be but another step to hold

that a window washing company that served a hotel would have to find out from week to week what the occupants of the several hotel rooms did for a living, whom they were representing, if their firms were engaged in interstate commerce. Soon the law's applicability would be '*reductio ad absurdum.*'

And this was not the decision in *Kirschbaum v. Walling*, 316 U. S. Reports 517. There the window washers, janitors and elevator operators were part of the establishment that was rented to the company engaged in interstate commerce."

The case of *Phillips v. Walling*, 323 U. S., cited in the Petitioner's brief is not applicable to the facts in the case at bar. In the Phillips-Walling case, the employer operated a chain of forty-nine retail grocery stores, forty of which were in Massachusetts and nine in Connecticut. It operated a separate warehouse and office building in Springfield, Massachusetts, which served all forty-nine stores. About eighty per cent of the merchandise passing through the warehouse was received from outside of Massachusetts and this Court held that the warehouse and central office of the petitioner chain store system could not properly be considered a retail establishment within the meaning of Section 13 (a) (2) of the Act. (Page 707 of Volume 89 of the Supreme Court Lawyers' Edition Advance Opinion.) This Court discussed the elimination of the middleman in the operation of chain stores whereby chain stores assumed the duties and functions of wholesalers. This obviously brings chain stores into the realm of interstate commerce.

The facts in the Phillips-Walling case cannot apply in the case at bar becouse here we are dealing with a service establishment and not a chain retail store engaged in two states.

In discussing the *Lonas v. National Linen Service Company*, 136 F. 2nd 433, in which Certiorari was denied by this Court (320 U.S. 785), the Petitioner attempts to dis-

tinguish between the services performed by a laundry and by a window-cleaning establishment, by seeking to emphasize the fact that, in a laundry, the employees are necessarily 'engaged in it' while in the window-cleaning establishment the employees are engaged elsewhere. Petitioner's brief emphasizes only that Respondent's employees wash windows of industrial concerns and factories, whereas as a matter of fact the Record indicates that the Respondent is not exclusively engaged in washing windows of industrial concerns. Petitioner attempts to place Respondent's service establishment in the same category as 'detective agencies,' 'protective agencies' and 'auctioneers' establishments' and attempts to stretch the meaning of the ordinary words beyond recognition.

The employees of the Respondent wash windows. They do not come in contact with any of the activities engaged in by the owner of the building or business. The owner of the building and/or the owner of the business has no control or supervision whatsoever over the employees of the Respondent. The Respondent has his own place of business where his employees report for work, are assigned to their jobs and return for further orders. They would be in the same category as a chain of barber shops, cleaning establishments, laundry establishments or any retail establishments which had a staff of salesmen who visited a number of concerns in the course of their work.

The criterion of coverage is not what Petitioner would have it appear. All of the cases cited in Petitioner's brief very clearly indicate that each case must be decided upon its own facts and circumstances and that there can be no set rule governing all situations.

The case of *Kirschbaum vs. Walling*, 316 U. S. 517, 86 L. Ed. 1638, chiefly relied upon by the Petitioner to sustain his alleged cause of action very definitely puts the Peti-

tioner out of court. The attorneys for the Government in that case stated (page 1642):

> "The statute does not attempt to enumerate what processes or occupations are 'necessary to the production.' That question is rather left to be determined upon the facts of individual cases as they arise" (citing cases).

Mr. Justice Frankfurter, on pages 1647 and 1648, said:

> "Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of congressional commercial regulatory measures and which therefore should govern their judicial construction."

A very important distinction explicitly stated in the *Kirschbaum v. Walling* case has apparently been completely overlooked by counsel for Petitioner. Mr. Justice Frankfurter, on page 1649, said:

> "The petitioners' buildings cannot be regarded as 'service establishments' within the exemption of Sec. 13(a) (2), 20 USCA, Sec. 213(a) (2). *Selling space in a loft building is not the equivalent of selling services to consumers*, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce" (Italics ours).

This distinction by Mr. Justice Frankfurter clearly shows that exemption under Sec. 13(a) (2) does have a different criterion for coverage.

In other words, while the courts have decided that the general test of coverage is the work of the individual employee, *the test of the exemption under* 13(a) (2) *is the business of the employer.* (Italics ours.)

In the case at bar Respondent is a Michigan corporation, engaged in the business of washing and cleaning windows for consumers. It is very definitely a service establishment. It sells nothing but its services and the services of its employees in washing and cleaning windows. It produces no goods; it sells no goods and is not engaged, and none of its employees, is engaged in "producing, manufacturing, mining, handling, transporting or in any other manner working on such goods or in any process or occupation necessary to the production thereof."

All the legal sophistry so ingeniously employed by Petitioner can not change the nature of the work and the business engaged in by the Respondent.

In the case of *McLeod v. Threlkeld*, 319 U. S. 491, 87 L. Ed. 1539 (lightly passed over by Petitioner), the Circuit Court of Appeals for the Fifth Circuit held that a cook employed to prepare and serve meals to maintenance of way employees of the Texas and New Orleans Railway Company was not engaged in commerce within the meaning of the Fair Labor Standards Act and therefore not entitled to recover for overtime. The defendants were a partnership with a contract to furnish meals to maintenance of way employees of the railroad, an interstate carrier. The meals were served in a cook and dining car attached to a particular gang of workmen and running on the railroad's tracks. Employees paid the contractor for their meals. The petitioner worked as a cook in various points in Texas

along the line of road during the period in question. The Supreme Court upheld the Circuit Court of Appeals that the employee was not engaged in commerce under the Fair Labor Standards Act.

In this connection, we believe that Judge Picard's opinion covers the situation in the case at bar: (R. 17-21.)

"May we not add that in rendering this opinion we are aware of the difference between the interpretative bulletins and instructions of the administrator evidenced by briefs of the respective parties as directed to our attention by plaintiff. But even if the difference is as controlling as claimed by plaintiff and while this Court has often recognized that the interpretations of the administrator are entitled to 'great weight,' *U. S. v. American Trucking Associations*, 310 U. S. 534, those interpretative bulletins are not the law. As stated by Judge Simons in *Lonas v. National Linen Service Corporation, supra:*

> "The administrator * * * contends that the exemptions in paragraph 13(a) (2) are limited to establishments retail in character whether they sell goods or services. This view is based upon what he conceives to be the implications to be drawn from the legislative history of the Act and the grammatical construction of the exemption section. Since the related terms are coupled in the same sentence and are used in the disjunctive with the terms 'retail' and 'service' both modifying the word 'establishment' they refer to employers who deal directly with private consumers as distinguished from commercial and industrial customers. In other words, the service establishment exemption extends only to those establishments having the characteristic of retail stores, and the defendant's business is not a retail service establishment because 60 per cent of its customers are industrial or business concerns.
>
> We find no support for this interpretation in the language of the exemption section. Two enterprises.

> are therein exempted, one a retail establishment and the other a service establishment, the exemption of each subject to the condition that in the case of the retail establishment the greater part of its selling must be in intra-state commerce, and in the case of a service establishment, the greater part of its servicing must be in intra-state commerce. Had the Congress intended to limit the exemption of service establishments to those which perform services for private individuals as distinguished from business enterprises, it would have had little difficulty in clearly expressing such purpose."

Petitioner's specious argument, if carried to its logical conclusion, would—as the trial court stated—reduce the law's applicability to an absurdity. (R. 19.)

II.

Petitioner is attempting to apply the interpretation of the Federal statutes involving the Interstate Commerce Commission, which include businesses or operations 'affecting commerce.' That is not the interpretation to be placed upon the Fair Labor Standards Act because the definition contained in this latter Act provides (Sec. 203 (b)):

> 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

Section 203 (i):

> 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

Section 203 (j):

> 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

In the case of 10 *East 40th Street Building v. Callus*, decided by this Court in the October term, 1944, and reported in 89 L. Ed. Advance Opinions, pages 1245-6-7, Justice Frankfurter said:

> "The Fair Labor Standards Act of (June 25) 1938 regulates wages and hours not only of employees who are 'engaged in commerce' but also those engaged 'in the production of goods for commerce.' Sections 6, 7, 52 Stat. 1060, 1062, 1063, c. 676, 29 USCA paragraphs 206, 207, 9 FCA Title 29, paragraphs 206, 207. For the purposes of that Act 'an employee shall be deemed to have been engaged in the production of goods if such an employee was employed * * * in any process or occupation necessary to the production thereof, in any State.'" Section 3 (j), 29 USCA paragraph 203, 9 FCA Title 29, paragraph 203. When these provisions first came here we made it abundantly clear that their enforcement would involve the courts in the empiric process of drawing lines from case to case, and inevitably nice lines. *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, 62 S. Ct. 1116. And this for two reasons. In enacting this statute Congress did not see fit, as it did in other regulatory measures, e.g., the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce. And 'Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor

Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations.' *A. B. Kirschbaum Co. v. Walling*, supra (316 U. S. at 523, 86 L. Ed. 1647, 62 S. Ct. 1116). Thus, Congress withheld from the courts the aid of constitutional criteria, compare, e.g. *Currin v. Wallace*, 306 U. S. 1, 83 L. Ed. 441, 59 S. Ct. 379; *Wickard v. Filburn*, 317 U. S. 111, 87 L. Ed. 122, 63 S. Ct. 82; *Polish Nat. Alliance v. National Labor Relations Board*, 322 U. S. 643, 88 L. Ed. 1509, 64 S. Ct. 1196, as well as the benefit of a prior judgment on vexing and ambiguous facts, by an expert administrative agency. Compare, e.g., *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49, 81 L. Ed. 918, 57 S. Ct. 642, 108 A.L.R. 1372; *Gray v. Powell*, 314 U. S. 402, 412, 86 L. Ed. 301, 310, 62 S. Ct. 326.

The act has produced a considerable volume of litigation and has inevitably given rise to judicial conflicts and divisions."

And again, on pages 1246-47:

"The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, watchmen and the like. They brought this suit under paragraph 16 (b) of the Fair Labor standards Act, 29 U. S. C. A. paragraph 215, 9 F. C. A. Title 29, paragraph 215, for claims of overtime payment to which they are entitled if their occupations be deemed 'necessary to the production' of goods for commerce. Concededly they are not 'engaged in commerce.' The District Court dismissed the suit. 51 F. Supp. 528. The Circuit Court of Appeals reversed. 146 F (2nd) 438. By a meticulous calculation, it found that the executive offices of manufacturing and mining concerns, sales agencies representing such concerns, and publicity concerns were engaged in the production of goods for interstate commerce, and, since the offices of these concerns occupied 42% of the rentable area and 48%

of the rented area, the maintenance employes of the owners of the building are engaged in occupations 'necessary for the production' of goods for commerce. Conflict between this result and that reached by other circuits led us to bring the case here. 324 U. S., —, ante, 565, 65 S. Ct. 678 (footnote).

"The series of cases in which we have had to decide when employees are engaged in an 'occupation necessary to the production' of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. See *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 87 L. Ed. 460, 63 S. Ct. 332; *Walter v. Southern Package Corp.*, 320 U. S. 540, 88 L. ed. 298, 64 S. Ct. 320; *Armour & Co. v. Wantock*, 323 U. S. 126, ante, 120, 65 S. Ct. 165; *Skidmore v. Swift & Co.*, 323 U. S. 134, ante, 125, 65 S. Ct. 161. In giving a fair application to paragraph 3 (j), courts must remember that the 'necessary' in the phrase 'necessary to the production of goods for commerce' is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority.' *A. B. Kirschbaum Co. v. Walling*, supra (316 U. S. at 525, 86 L. Ed. 1548, 62 S. Ct. 116). For as was pointed out in *Walling v. Jacksonville Paper Co.*, supra (317 U. S. at 570, 87 L. Ed. 467, 63 S. Ct. 332), we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' *We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.*" (Italics ours).

Petitioner attempts to limit the scope of the exemption by an interpretation of the word 'establishment' which does violence to the customary use of the word. The case at bar is not the case of the employment of an independent contractor to evade the provisions of the Act. The employees were employees of the Respondent for a number of years preceding and including 1939 and up to and including the commencement of suit in the District Court. (R. 10). The employees of the Respondent do not work on any goods, do not come in contact with any goods, do not come in contact with any of the processes used or necessary in the production of goods. They wash windows. In fact, they have less to do with the industrial concern than the laundry furnishing towels and supplies for employees, which launders and delivers the towels into the industrial plants.

In the case of *Walling v. Fred Wolferman, Inc.*, D. C. Mo. 1944, 54 F. Supp. 917, the court held that the word 'establishment' was used "not in a technical sense but in its ordinary meaning with emphasis upon the concept of permanency and without intending to limit operation of this section to a single store." Again, in this case, the court said:

> "Failure of Congress in defining certain words used in this chapter to define the word 'establishment' suggests that Congress intended it should be taken in its ordinary meaning.
>
> The word 'establishment' though used in the immediately following clause of this section, is not among the words which administrator of this chapter is authorized to define, and the rule *expressio unius est exclusio alterius* is applicable."

In the case of *White v. Jacobs Pharmacy*, 47 Fed. Sup. 298 (District Court N. D. Georgia, Atlanta Division) the Court on page 299, said:

> "It may be stated at the outset that while in applying the provisions of Sections 6 and 7 of the Fair Labor Standards Act the test of coverage related to the nature of the employment of the particular employee (*Fleming v. A. B. Kirschbaum*, 3 Cir., 124 F. 2nd 567), as concerns exemptions 'the criterion used in Section 13(a) (2), on the other hand is based upon the nature of the business conducted by the employer.' *Interpretive Bulletin No. 6, Wage & Hour Division, Fleming v. A. B. Kirschbaum, supra,* 124 F. 2d at page 570, note 2. This distinction clearly appears from the words of the statute. Thus in dealing with the present case the true question is the nature of the business conducted by the defendant. * * *
>
> "It thus appears from the interpretation of the Administrator, as well as from the contention of the plaintiff in this case, that the sole fact relied upon to remove the defendant's operation from the effect of the exemption is the physical location of its office and warehouse, as well as the fact that its branches are located in eighteen separate buildings instead of one building. The operations of the plaintiff meet every test laid down by the Wage & Hour Division except that of physical location. Nothing is found within the terms of the statute which justifies a determination of the question of whether an enterprise is or is not a retail establishment predicated solely upon the physical location of its component parts. It appears rather that it was the clear intention of Congress to remove the effect of the operation of the statute from those firms engaged in retail selling either intrastate, or when even the 'greater part of whose selling * * * is in intrastate commerce.' It is the nature of the business rather than the location or locations in which it is conducted which determines coverage or exemption under the statute."

In the case of *Walling v. Rolland Electric Co.*, 54 Fed. Sup. 733, District D, Maryland, the Court approvingly quoted the case of *Lonas v. National Linen Service Co.*, and the decision of the Circuit Court of Appeals in the case at bar.

In the case of *Twyman et al v. Milk Bottlers Federation*, 47 N. Y. Sup. 2nd Series, 206, the Court held that the business of the defendant was that of a service establishment and that as such it was within the exception provided for in the second clause of subdivision (a) Section 213 of the Fair Labor Standards Act.

In the case at bar the various tests applied to determine whether a concern is a service establishment lead to the inevitable conclusion that the Respondent meets these tests and is a service establishment.

The Respondent performs services directly for the consumer, namely, it washes windows for the consumer who occupies the building. The employees are employees of the Respondent under the direct supervision and control of Respondent. The Respondent hires its own employees and then details the work to be done by the employees. The Respondent is not in any way connected with, nor are its employees connected with, either the buildings in which they wash windows or any of the proceedings or activities maintained in the buildings.

In the case of *Gavril v. Kraft Cheese Co.*, 42 F. Supp. 702, District Judge Campbell, on page 704, said:

> "In order to clarify activities of the employee, however, it is necessary to consider the activities of the employer by whom he is engaged."

As previously stated in this Brief, Mr. Justice Frankfurter, in the *Kirschbaum* case, supra, distinguished the facts in that case. The employees in the *Kirschbaum*

case, supra, were actually engaged in the production of goods for commerce. The companies for whom they worked rented the buildings to manufacturers engaged in interstate commerce. The building employees provided the elevator service which carried the goods in and out of the building, operated the boilers which provided the heat for the manufacturing enterprises. The owners of the buildings were not engaged in servicing to customers. They were renting space to manufacturing establishments. The Government, in its brief, as quoted in the Supreme Court decisions, clearly posited its claim on the employer being engaged in interstate commerce in that its employees actively participated in the handling of goods in interstate commerce. The Government claimed (page 1643):

> "The activities of maintenance employees such as those here involved constitute processes or occupations necessary to production within the meaning of Sec. 3(j), 29 USCA, Sec. 203(j)" (citing cases).

And again on page 1643:

> "Petitioner's freight elevator operators are also 'engaged in commerce' within the meaning of Sec. 6 and 7, 29 USCA, Sections 206, 207" (citing cases).

And on page 1644:

> "Performance of the carrier's contract for interstate transportation is completed only when delivery is accepted by the consignee, the manufacturer, at his own premises on a certain floor of petitioner's building" (citing cases).

III.

A.

Petitioner devotes almost one-third of his brief on an assumption of fact which was neither admitted nor an issue in either of the lower courts, namely, the necessity of washing windows. Respondent respectfully submits that the question of the advisability of window cleaning would have been a disputed question of fact if the case had gone to trial. However, the District Court having found in his opinion of February 3, 1943 (R. 14-16), that the Respondent was a service establishment, which he affirmed in his opinion filed July 14, 1943 (R. 17-21), the question thereafter was whether or not the greater portion of Respondent's servicing was interstate or intrastate. The trial court found all of the servicing was done within the State of Michigan on buildings located in the State of Michigan and held accordingly that the service was intrastate.

Nowhere in the Act is there any basis for the assumption of the Petitioner that, because a service may affect commerce in some remote way, it automatically comes within the purview of the Act. Again, we respectfully submit that Petitioner's position is based upon a single phrase removed from the paragraph of the definition of the word "produced" (Section 203 of Fair Labor Standards Act), whereas the entire paragraph must be read together in its relation to the entire Act.

Under "Definitions" in Section 203 of the Act, we find:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (Italics ours.)

Respondent further submits that this present position of the Petitioner is a shift from the position originally taken in an attempt to enlarge the scope of the Act. It is based upon an erroneous conclusion of fact.

It may be well to call attention at this time to the fact that industry generally all over the country and particularly in Detroit has been operating on a twenty-four hour basis for a number of years, so that workers were employed under artificial light for at least as many hours a day as those who were working days. Further, even those working during the daylight hours are very frequently working under artificial light because all machinery and equipment are not built around the outside portions of factory buildings where the windows are located. May we also be permitted to call to the court's attention the fact that new developments in architecture of buildings, both industrial and private, which have already been put into effect, call for buildings without any windows at all.

Petitioner's brief having been delivered to counsel for Respondent just three weeks before the date the cause was noticed for argument, there has not been sufficient time for the research necessary to answer completely the complicated deductions presented by the Petitioner. Respondent contends that this issue is a new one introduced for the first time in this Court (R. 11-12) and should not be considered.

B.

Petitioner insists upon a conclusion of fact which has no foundation in the case at bar, namely, that Respondent sends its employees into manufacturing plants. Employees of Respondent are not sent 'into' manufacturing plants in the sense employed by Petitioner. Employees of Respondent wash windows. The windows are in the outside walls of buildings. We can safely assume that the washing of windows is not an occupation requiring many hours every day in every industrial plant as Petitioner would like to infer.

In 20 *Corpus Juris*, 1257, we find the definition of '*engaged in*' as "employed at; transacting or carrying on the work or business or service for which one is employed." In 21 *Corpus Juris* 904, we find that '*establishment*' among other things means "*an institution.*" An institution is defined in 32 *Corpus Juris*, 942:

> "* * * The term is sometimes used as descriptive of the establishment or place where the business or operations of a society or association are carried on; at other times it is used to designate the organized body, and sometimes it is used in both of these senses. '*Institution*' may include not only its property, but also all of its legitimate activities that are consistent with, and in furtherance of, the purposes for which it was organized."

Would Petitioner contend that employees driving delivery wagons for a retail establishment are outside of the exception of the law because not engaged in the "establishment"? What about itinerant salesmen, truck drivers, delivery-men, taxicab operators, street car conductors and motorman, street-cleaners, etc., who are not "engaged in 'the' establishment" of their employers according to Petitioner's definition? We ask the questions so as to indicate the absurdity of the Petitioner's position.

IV.

The third question submitted by Petitioner has been raised for the first time in this Court. It was not presented in the Circuit Court of Appeals as the Record will show. In the case of *Helvering v. Minnesota Tea Company*, 296 U. S. 378, 80 L. Ed. 284, this court held that a point which was not raised prior to the Petition for Certiorari will not be considered.

However, we do wish to bring pertinent facts to the attention of this Court. The District Court did not of its own motion dismiss the complaint. The District Court denied the Petitioner's motion for summary judgment on February 3, 1943. (R. 16). Thereafter, on May 6, 1943, additional stipulation of facts was filed. (R. 16-17). Following that, on June 15, 1943, the Petitioner (plaintiff) renewed a motion for summary judgment as follows:

"RENEWAL OF MOTION FOR SUMMARY JUDGMENT

(Filed June 15, 1943)

To the Court:

The plaintiff renews the previous motion for summary judgment which was heretofore decided by this Court.

This motion is based on the records, pleadings, and the Stipulation of Fact, and in particular on the Further Stipulation of Facts recently filed in this Court and cause.

This motion is submitted on briefs, in accordance with instructions of the Court.

LEON A. COUSENS,
Attorney for Plaintiff."
(R. 17).

This clearly shows that the motion was not filed at the direction of the court. All the court directed was that there be no further argument and that the matter be submitted on briefs.

Petitioner's (Plaintiff's) motion was based upon 'records, pleadings, stipulation of facts.' The motion to dismiss Petitioner's (Plaintiff's) complaint was contained in the Answer and Special Defenses of Respondent (Defendant). It, therefore, became the duty of the District Court to make a determination of the case upon Petitioner's (Plaintiff's) motion, which he did in his opinion of July 14, 1943, which was followed by the Judgment and Findings At Law filed August 30, 1943. (R. 21-22).

The action of the District Court can in no way be interpreted to have been *sua sponte*. All of the proceedings were initiated by the Petitioner (Plaintiff).

Respondent further contends that an attempt on the part of the Petitioner at this time to inject suppositions as to what the proofs would have been or might have shown is out of place and should have no bearing in the case at bar. They are not based upon fact or law,—they are wholly conjectural.

It is manifestly unfair for the Petitioner to be permitted to go off into realms of possibilities, conjectures and suppositions concerning the effect of proposed testimony which might have been introduced. All of this speculation should have no place in the present proceedings.

V.

In order to have the proper background with all pertinent facts in relation to the controversy in the case at bar, Respondent believes that question number three submitted by Respondent in the Circuit Court of Appeals is necessary to be presented to this court.

MAY EMPLOYEES MAINTAIN A SUIT FOR ADDITIONAL OVERTIME PAY, DAMAGES AND ATTORNEYS' FEES UNDER THE ACT, WHERE A BONA FIDE AGREEMENT WAS ENTERED INTO AS A RESULT OF COLLECTIVE BARGAINING, BETWEEN THEM THROUGH THEIR LEGAL REPRESENTATIVE UNION AND THE EMPLOYER, SAID AGREEMENT COVERING HOURS OF LABOR, RATES OF PAY AND OVERTIME PAY, CLOSED SHOP PROVISIONS, BASED UPON A MUTUAL UNDERSTANDING AND BELIEF THAT THE FAIR LABOR STANDARDS ACT DID NOT APPLY TO THE EMPLOYEES, WHICH SAID AGREEMENT HAD BEEN FULLY CONSUMMATED AND ADHERED TO BY THE PARTIES?

It would not be amiss at this time to quote the declaration of policy set forth by Congress in the enactment of the law, among which we find:

> "Sec. 2 (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum of workers * * * (4) *leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce*" (italics ours).

In the case at bar the agreements each year were negotiated by the employer and the employees through their duly authorized agent, a bona fide labor union. The company had the right to rely upon the good faith of its employees as represented by their agent, the union, in the negotiations and in the execution of the contracts. It is undisputed that the defendant has fully complied with all the terms of the agreements. It is undisputed that the agreement was not an attempt to circumvent the Fair Labor Standards Act. Its very provisions indicate the contrary.

In the case at bar the action of the Petitioner (plaintiff) tends to bring about the very condition which the Fair Labor Standards Act intended to minimize and eventually eliminate, namely, labor disputes. We have this anomalous

situation: A bona fide labor organization enters into a bona fide contract with an employer upon a mutual honest understanding and belief that the provisions of the Fair Labor Standards Act do not apply to the particular employer and his employees. The agreement is fully executed by the defendant employer.

Subsequently, the *Kirschbaum v. Walling* case appeared, which was decided by the United States Supreme Court and first reported in the Lawyers Edition Advance Opinions on June 9, 1942. Thereupon, plaintiffs instituted the present suit, repudiating their own agreement. In this suit plaintiffs ask for time and a half for hours for which they were paid straight time under the express terms of the written agreement voluntarily executed by them with the defendant.

In the case of *Clour v. Jones*, 42 F. Supp. 700, the plaintiff was employed by defendant as a pumper on an oil and gas lease. At the time plaintiff was discharged by defendant he was given a check for payment in full for all services theretofore performed. Prior to the time plaintiff was discharged there had been no question between him and the defendant as to overtime. Upon the trial of the case it developed that plaintiff had worked overtime and was entitled to be paid. Defendant contended that the check given was in final payment, which included all that was due the plaintiff as compensation for overtime. This was submitted to a jury and the jury found in favor of defendant's contention. Thereafter the plaintiff raised the question that he was entitled to liquidated damages for overtime for which he had already been paid in accordance with the provisions of the Fair Labor Standards Act. The Court on page 700, said:

> "One question yet remains, and that is, whether or not the plaintiff is entitled to recover the judgment for liquidated damages. The court is of the

opinion that under the facts of the case the plaintiff is not entitled to such judgment. At the time of his discharge the defendant paid the plaintiff all amounts due him. *The court is of the opinion that during the time that the plaintiff was working for the defendant, the defendant in good faith did not believe that the plaintiff came within the provisions of the Wages and Hours Law or the Fair Labor Standards Act*, 29 USCA Sec. 201 et seq. It is doubtful if prior to the time of his discharge the plaintiff himself considered that he came within the provisions of the Act. Under the state of facts the court does not believe that the defendant should be required to pay any amount as liquidated damages, having compensated the plaintiff in full for his overtime at the date of his discharge. It follows that the plaintiff's attorney is not entitled to recover any attorney's fee. The attorney for the defendant will prepare a proper form of judgment in accordance with this memorandum, and this cause is set for entry of judgment at Muskogee on June 27, 1941." (The italics are ours.)

In the case at bar we have circumstances very similar to the facts in the case of *Clour v. Jones*. We have both parties acting honestly under an interpretation of the law, namely, that the defendant employer is not engaged in interstate commerce, and that the Fair Labor Standards Act does not apply. The agreements are the result of negotiations between the employers and the union representing the employees. The union subsequently reduced the agreements to printed form and the agreements were signed by a number of employers. Defendant employer performed all of its duties and obligations under the agreement.

Walling v. Belo Corp., 316 U. S. 624, 86 L. Ed. 1716. The Supreme Court, on page 1723, said:

> "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an in-

flexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected."

In the case at bar there was a bona fide agreement entered into between a bona fide union representing employees and the Defendant employer. Each year as the agreement terminated, negotiations were entered into and a new agreement drawn as a result of the negotiations. All of these agreements over the course of years since the effective date of the Fair Labor Standards Acts were based upon the understanding honestly arrived at by both the union representing the employees and the defendant, that the defendant was not engaged in interstate commerce within the meaning of the Act and that the employees were not affected by the Act. There has been no judicial determination otherwise.

In June, 1942, the Supreme Court of the United States handed down its decision in the *Kirschbaum v. Walling* case, supra, which, upon first blush, appeared to include service corporations such as the respondent in the case at bar within the meaning of the Act. Shortly thereafter, the business agent of the Union instituted suit against the respondent for overtime pay and liquidated damages, which amounts to an attempt to violate the agreements honestly entered into between the parties.

The facts in the case at bar are clearly within the purview of the case of *Pittsburgh & Lake Iron Co. v. Lake Superior Iron Co.*, 118 Michigan 109. In this case the parties signed an agreement among themselves in reference to certain riparian rights and boundaries on an inland

lake, which provided for drainage of the lake, and the plaintiff mined out valuable ore in that portion which the contract awarded to it.

The theory of the plaintiff's bill of complaint was that the territory formerly covered by the water of the lake should be divided among the shore owners in proportion to the shore frontage owned by each, that such ownership extended to the center of the lake, and that the territory should be partitioned by convergent lines drawn from the outside limits to a convergent point called the equitable center. The plaintiff claimed certain pieces of land carved out of the bed of the lake, based upon this convergent point.

The defendants claimed that the agreement between the parties had settled their differences and that the agreement had been carried out between the parties, involving considerable expense to all of them and set up the defense of estoppel, laches, and the agreement of the parties executed and complied with by the defendants. Chief Justice Grant wrote the opinion, and on pages 123 and 124, said:

> "That contract was a deliberate settlement of the boundary line between the lands of the three companies and was so understood. It was of utmost importance to these parties that the boundary line be settled to beyond any possible doubt. * * * The contract, if valid, established the line beyond dispute. The first obstacle for the complainant to remove, before resorting to equitable apportionment, is this contract, recognized as valid and acted upon for nearly five years by all parties. It attempted to do this by asserting that in making that contract it relied upon the case of *Clute v. Fisher*, 65 Mich. 48, as establishing a rule that the territory should be divided by the government lines, and that it rested upon the case as the established law until the decision of *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.*, 102 Mich. 227, claiming

that the latter overruled the former, and that in making that contract there was a mutual mistake which entitled it to the relief prayed."

And again on page 126:

"We find that the parties, in reliance upon that case (*Clute v. Fisher*), entered into a deliberate contract establishing their boundary lines and determined the amount of territory belonging to each. * * * The result of complainant's contention would be that whenever any case had been overruled, every transaction or agreement based upon that decision may be set aside by the courts if not barred by statute of limitations. The *agreements and settlement of parties made with full knowledge of the facts and in reliance of the law, ought to be as binding as the judgment of the court in a particular case. If ten other suits had been pending when* Clute v. Fisher *was decided and judgments had been rendered in reliance of that decision, the courts could not now set them aside.* The law is not so unstable as to permit such results. Judgments rendered and contracts made upon the faith of the law as enunciated in the decision of the court, in the absence of fraud or misrepresentation, must stand. When that decision is overruled, the overruling decision controls only subsequent transactions." (Citing cases.)

In the case of *Utermahle v. Norment*, 49 L. Ed. 655, Mr. Justice Peckham, on page 662, said:

"It has been held from the earliest days, in both the Federal and State courts, that a mistake of law pure and simple, without the addition of any circumstance of fraud or misrepresentation, constitutes no basis for relief at law or in equity and forms no excuse in favor of the party asserting that he made such mistake."

CONCLUSION

The interpretation suggested by Petitioner would read into the law language never intended by Congress. If it had been the intent of Congress to include all activities affecting commerce, then certainly the statute would so have provided. The Act sets forth the Findings and Declaration of Policy and definitions of words used in the Act.

The Act then goes on to provide for the appointment of industry committees, for each industry engaged in commerce or in the production of goods for commerce. (Section 205 of the Act). (No such committee was ever appointed for the window cleaning businesses.)

Section 206 of the Act then provides for minimum wages starting at 25c an hour, up to 30c an hour. Section 207 provides for the maximum hours of employees covered by the Act. Section 208 sets forth the main objective, and says:

> "(a) With a view to carrying out the policy of sections 201-219 of this title by reaching, as rapidly as is economically feasible without substantially curtailing employment, *the objective of a universal minimum wage of* 40 *cents an hour in each industry engaged in commerce* or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers engaged in commerce or in the production of goods for commerce in such industry or classification therein." (Italics ours.)

Section 213 provides the exemptions. It is the claim of the Respondent that its business comes within the exemption.

A reading of the entire Act, the purposes for which it was enacted, the objectives sought to be obtained, clearly shows that the lower courts did not err in arriving at their decisions in the case at bar.

Petitioner attempts to creat a situation which is far removed from the purposes and objectives of the Fair Labor Standards Act. As stated by this Court in the case of *United States v. American Trucking Associations*, 310 U. S. 534; 84 L. Ed. 1345, page 1350:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsman of a statute, particularly in a law drawn to meet needs of a major occupation."

It is the contention of Respondent that the position of the Petitioner is untenable. There is no question but that the Respondent is a service establishment. There can be no question but that the Respondent comes squarely within the exemptions of the Statute. We therefore respectfully submit that the relief prayed for by the Petitioner should be denied, with costs to this Respondent.

Respectfully submitted,

LARRY S. DAVIDOW,
Attorney for Respondent.